



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 219 and 252**

**[Docket DARS-2019-0015]**

**RIN 0750-AK39**

**Defense Federal Acquisition Regulation Supplement:**

**Nonmanufacturer Rule for 8(a) Participants (DFARS Case 2019-D004)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a Small Business Administration rule that implemented a section of the National Defense Authorization Act for Fiscal Year 2013 to revise and standardize the limitations on subcontracting and the nonmanufacturer rule, which apply to small business concerns, including participants in the 8(a) Program.

**DATES:** Effective [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer D. Johnson, telephone 571-372-6100.

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

DoD published a proposed rule in the *Federal Register* at 84 FR 12187 on April 1, 2019, to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the *Federal Register* at 81 FR 34243 on May 31, 2016. SBA's final rule implemented section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting and the nonmanufacturer rule that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to Federal Acquisition Regulation (FAR) part 19, Small Business Programs. Two respondents submitted public comments in response to the proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule.

*A. Summary of Significant Changes.* There are no significant changes made to the final rule from the proposed rule. One minor edit is made to the clause in paragraph (a)(3) to change "by the SBA" to "by SBA".

*B. Analysis of Public Comments*

1. Support for the Rule

*Comment:* Both respondents expressed support for the proposed rule.

*Response:* DoD acknowledges the respondents' support.

## 2. Scope of the Rule

*Comment:* The respondents recommended expanding the rule to include all small businesses instead of limiting the rule to 8(a) participants. One respondent noted that application of the nonmanufacturer rule to all small business set-asides would require contracting officers to make a good faith effort to locate small business manufacturers before requesting a waiver from SBA. The respondent further noted that, without the nonmanufacturer rule and the waiver process, small business nonmanufacturers would serve as a pass-through for large global and foreign manufacturers.

*Response:* The scope of this final DFARS rule is limited to the 8(a) Program and cannot be expanded to all small business set-asides. Application of the nonmanufacturer rule to all small business set-asides is addressed in the FAR and will be updated in the final rule for FAR case 2016-011, Revision of Limitations on Subcontracting. DoD contracting officers must follow the FAR with regard to application of the nonmanufacturer rule to small business programs other than the 8(a) Program. In competitive procurements under the 8(a) Program, DoD contracting officers must use the clause at DFARS 252.219-7010, Notification

of Competition Limited to Eligible 8(a) Participants-Partnership Agreement, which takes into account the Partnership Agreement between DoD and SBA.

### **III. Expected Impact of the Rule**

Prior to publication of this final rule, the clause at DFARS 252.219-7010 required 8(a) participants that offer end items they did not manufacture or produce (i.e., nonmanufacturers) to offer end items manufactured or produced by small business concerns in the United States or its outlying areas. This requirement is known as the "nonmanufacturer rule." DFARS 252.219-7010 provided an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. For these contracts, an 8(a) participant could offer end items manufactured or produced by any domestic firm.

SBA's final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value. There was no exemption for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. Therefore, this rule removes that exemption from DFARS 252.219-7010. This change means the nonmanufacturer rule will apply to 8(a) contracts at any dollar value, and 8(a) participants that are nonmanufacturers will be required to offer end items manufactured, processed, or produced

by small business concerns in the United States or its outlying areas.

To estimate the number of 8(a) participants that may be impacted by this change, DoD obtained data from the Federal Procurement Data System on DoD contracts, for products, awarded to 8(a) participants under the 8(a) Program. Contracts for services, including construction, were excluded because the nonmanufacturer rule only applies to products, not services. In FY 2016 through FY 2018, DoD awarded contracts for products to an average of 285 8(a) participants each year. An average of 90 of those 8(a) participants per year were awarded approximately 2 contracts each that were valued at or below \$25,000, using simplified acquisition procedures. Therefore, DoD estimates that approximately 90 participants may be impacted by this rule. Due to the small number of 8(a) participants that may be impacted, it is expected that the cost associated with this rule will be de minimis.

#### **IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule applies the requirements of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of

commercial items, including commercially available off-the-shelf (COTS) items.

*A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Therefore, given that SBA applied section 1651 to contracts and subcontracts at or below the SAT and that nearly 76 percent of the DoD contracts awarded to 8(a) participants in recent years are valued at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply section 1651 to contracts or subcontracts at or below the SAT.

*B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items*

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

### *C. Determinations*

DoD has determined that it would not be in the best interest of the United States to exempt contracts not greater than the SAT or for the acquisitions of commercial items, including COTS items, from the applicability of section 1651 of the NDAA for FY 2013. These requirements are reflected in the SBA final rule published in the *Federal Register* on May 31, 2016 (81 FR 34243), which did not exempt contracts and subcontracts at or below the SAT or the acquisition of commercial items that are competed among, or awarded on a sole-source basis to, 8(a) Program

participants. Application of section 1651 to these procurements will ensure that the benefits of contracts awarded under the 8(a) Program will flow to the intended parties. Nearly 76 percent of the DoD contracts awarded under the 8(a) Program are in amounts at or below the SAT, and approximately 72 percent of such contracts are for commercial items, including COTS items. Therefore, it is in the best interest of the Federal Government to apply the rule to contracts in amounts at or below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.



## **VI. Executive Order 13771**

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

## **VII. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the *Federal Register* on May 31, 2016, at 81 FR 34243. SBA's final rule implemented section 1651 of the National Defense Authorization Act for Fiscal Year (FY) 2013 (Pub. L. 112-239; 15 U.S.C. 657s), which revised and standardized the limitations on subcontracting and the nonmanufacturer rule that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to Federal Acquisition Regulation part 19, Small Business Programs.

The objective of the rule is to implement the revised nonmanufacturer rule for 8(a) Program participants by updating the clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Participants-Partnership Agreement.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

This rule will apply to 8(a) participants that contract with DoD. According to data obtained from the Federal Procurement Data System (FPDS), DoD awarded contracts for products (i.e., contracts to which the nonmanufacturer rule would apply) to an average of 285 8(a) participants each year during FY 2016 through FY 2018. The clause at DFARS 252.219-7010 provided an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. SBA's final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value, with no exemption for contracts at or below \$25,000. DoD awarded contracts at or below \$25,000 to an average of 90 8(a) participants each year during FY 2016 through FY 2018.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

There are no known, significant alternatives that would meet the requirements of the applicable statute.

#### **VIII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 219 and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 219 and 252 are amended as follows:

1. The authority citation for parts 219 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 219--SMALL BUSINESS PROGRAMS**

**219.811-3 [Amended]**

2. Amend section 219.811-3 by removing "Eligible 8(a) Concerns" and adding "Eligible 8(a) Participants" wherever they appear.

**PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. Amend section 252.219-7010 by-

a. In the section heading, removing "Eligible 8(a)Concerns" and adding "Eligible 8(a) Participants" in its place;

b. In the clause heading-

i. Removing "Eligible 8(a)Concerns" and adding "Eligible 8(a) Participants" in its place; and

ii. Removing "(MAR 2016)" and adding "(OCT 2019)" in its place;

c. In the paragraph (a) introductory text, removing "in the SBA's" and adding "in SBA's" in its place;

d. In paragraph (a)(2), removing "by the SBA" and adding "by SBA" in its place;

- e. In paragraph (a) (3), removing "by the SBA" and adding "by SBA" in its place;
- e. Redesignating paragraph (d) (2) as paragraph (e); and
- f. Revising paragraph (d).

The revision reads as follows:

**252.219-7010 Notification of Competition Limited to Eligible**

**8(a) Participants-Partnership Agreement**

\* \* \* \* \*

(d) (1) Unless SBA has waived the requirements of paragraphs (d) (1) (i) through (iii) and (d) (2) of this clause in accordance with 13 CFR 121.1204, a small business concern that provides an end item it did not manufacture, process, or produce, shall-

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers, see paragraph (d) (2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit

shall be manufactured, processed, or produced by small businesses in the United States or its outlying areas.

(3) The requirements of paragraphs (d) (1) (i) through (iii) and (d) (2) of this clause do not apply to construction or service contracts.

\* \* \* \* \*

[FR Doc. 2019-23811 Filed: 10/30/2019 8:45 am; Publication Date: 10/31/2019]